

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:PEN:PHI:TL-N-992-99

JCFee

date: February 25, 1999

to: Chief, Examination Division, Pennsylvania District
Attn.: Case Coordinator, Coordinated Examination Branch #4: E:1402

from: Assistant District Counsel, Pennsylvania District, Philadelphia

subject:

EIN: [REDACTED]

Tax Year: [REDACTED]

Unassessed Payment Made with Amended Return

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

By informal request on February 9, 1999, you asked for our advice and recommendations with respect to an unassessed payment of tax made by the taxpayer with a Form 1120X.

ISSUES

1. Whether the Service can assess additional tax shown on a Form 1120X after the tolling of the statute of limitations but where the taxpayer had full paid the additional tax prior to the expiration of the limitation period.
2. Assuming that the Service cannot assess the additional tax, whether the Service should refund, or can be compelled to refund the unassessed payment of tax that was remitted by the taxpayer with its Form 1120X prior to the tolling of the

statute of limitations.

3. Assuming that the Service can neither assess the additional tax nor be compelled to refund the tax payment, whether the Service is time barred from assessing and collecting underpayment interest on the additional tax.

CONCLUSION

1. The Service cannot assess any additional tax after the statutory three year limitation period for assessment under §6501.
2. The Service cannot be compelled to refund the unassessed payment of tax made with Form 1120X since there is no overpayment of tax for the taxable year. Further, the Service should not voluntarily refund the payment to the taxpayer since there is no statutory authority for doing so.
3. The Service is time barred from assessing and collecting any underpayment interest on the additional tax reported and paid with Form 1120X.

FACTS

The taxpayer filed an Amended U.S. Corporate Income Tax Return (Form 1120X) for tax year [REDACTED] on [REDACTED]. The amended return showed additional tax due of \$ [REDACTED] which the taxpayer paid in full. The taxpayer did not make a payment of underpayment interest attributable to the \$ [REDACTED]. The \$ [REDACTED] payment was processed and credited to the taxpayer's account. However, the additional tax due was never assessed; likewise, underpayment interest on the additional tax was not assessed. The taxpayer filed its original return on [REDACTED] and the last date for assessing tax under the normal statute of limitations was [REDACTED].

The taxpayer has not been notified that the tax has not been assessed. The taxpayer has not requested a refund of the unassessed payment.

ANALYSIS

Section 6501(a) provides that the amount of any tax shall be assessed within three years after the return was filed. None of the exceptions to this normal three years statute provided in §6501 are relevant to this case.

We first considered the question of whether the amended return filed [REDACTED] constitutes a "return" for purposes of §6501, in which case there would be a fresh three year statute. We conclude that the original return controls the statute of limitations and that an amended return is not a return for purposes of § 6501(a). An amended return is simply a modification or supplement to the original return, and not a return in its own right. Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934). Section 6501(c)(7) further supports this point by the fact that the Service has at least 60 days to assess tax from a "document signed by the taxpayer" showing additional tax and filed by the taxpayer with less than 60 days remaining on the normal three year statute. Thus, the three year limitation period runs from the date the original return was filed; in this case the statute of limitations on assessment and collection ran on [REDACTED].

We also considered whether we could assess beyond the three year period because of the unusual facts in this case. The unassessed tax represents an additional tax liability to which the taxpayer consented by filing an amended return making payment of the additional tax liability prior to the expiration of the statute. However, notwithstanding the taxpayer's agreement to an additional liability, we find no authority for a late assessment under these circumstances. The Service is time barred from assessing the additional tax of \$[REDACTED].

We next considered the issue of whether the taxpayer is entitled to a refund of the unassessed payment of tax. We conclude that it is not since the entitlement of a refund is predicated on the existence of an "overpayment of tax". There was no overpayment of tax in this case. Section 6401(a) states:

The term "overpayment" includes the part of the amount of the payment of the internal revenue tax which is assessed or collected after the expiration of the period of limitation applicable thereto.

On other words, payment of a barred tax liability made after the statutory period, whether made voluntarily or involuntarily, is by definition an overpayment subject to a mandatory refund. Diamond Garner Corp v. Commissioner, 38 T.C. 875, 879-81 (1962).

However, since the \$[REDACTED] was "collected" in this case prior to the expiration of the statutory period there is by definition no overpayment subject to refund. The taxpayer recognized a tax liability which it full paid prior to the running of the statute of limitations. We must keep in mind that an assessment is the bookkeeping entry to record the taxpayer's

liability. Cohen v. Mayer, 199 F. Supp. 331, (D.N.J. 1961), aff'd sub. nom., Cohen v. Gross, 316 f.2d 521 (3rd Cir. 1963). The assessment is not the liability itself, it does not create the liability, and it is not a condition precedent to the liability. It simply acts as a lien or judgment for taxes found due. Bull v. United States, 295 U.S. 247, 259 (1935). Thus, the payment of properly owed taxes within the statutory period of limitations is not an overpayment even if there is no corresponding assessment. Crompton & Knowles Loom Works v. White, 65 F.2d 132 (1st Cir.), cert. den., 290 U.S. 699 (1933); see also, Rev. Rul. 85-67, 1985-1 C.B. 364, citing Lewis v. Reynolds, 284 U.S. 281 (1932).

The final issue is whether the Service may assess and/or collect interest on the additional unassessed tax liability of \$[REDACTED]. We conclude that the Service is time barred with respect to interest. Since no interest on the unassessed additional tax has been assessed or paid prior to the running of the statute of limitations, we find no authority for the Service to assess and collect it now. In fact, the authority indicates otherwise, i.e. we are time barred from assessing the interest. Crompton & Knowles Loom Works v. White, *supra*.

Section 6601(g) states that "interest... on any tax may be assessed and collected at any time during the period within which the tax to which such interest related may be collected." At first glance, it may appear that since we have already "collected" the underlying tax there is no immediate bar to the Service assessing and collection the related interest; i.e. the "10 year collection statute," to which we typically refer, would give us adequate time to assess/collect interest. However, our reading of 6601(g) in conjunction with the collection statute provisions of §§6501 and 6502 indicates otherwise. The prerequisite for application of the "10 year collection statute" is an assessment of tax. Section 6502(a) states:

Where the assessment of any tax imposed ... has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun --(1) within 10 years after the assessment of the tax.[Emphasis added].

In this case, there is has been no assessment of the \$[REDACTED] within the period of limitation applicable thereto. Therefore, the 10 year collection statute of §6502(a)(1) does not apply to the collection of the underlying tax in this particular case. Rather, the statutory period for collecting unassessed tax is governed by §6501(a). Section 6501(a) provides that the

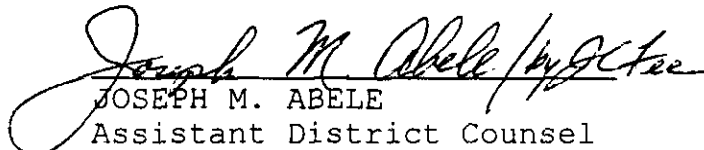
amount of any tax imposed shall be assessed within 3 years after a return is filed and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. Since the underlying tax was not assessed and cannot now be assessed, it follows that "the time ... within which the tax to which such interest relates may be collected" for purposes of §6601(g) expired with the normal three year statute of limitation, i.e. [REDACTED]. In our opinion, the fact that the underlying tax was previously "collected" does not change this result.

RECOMMENDATION

The Service should not refund the \$ [REDACTED] of tax paid with the amended return, based on its inability to assess the additional tax. Any claim for refund filed by the taxpayer on this basis should be denied without negotiation. There is no duty for the Service to notify the taxpayer of its failure to timely assess the additional tax because the Service's right to retain the tax payment is absolute and, in our view, such notification would invite meaningless controversy and perhaps frivolous litigation.

The Service should instruct the Service Center to make the necessary entry to the taxpayer's account to avoid having the \$ [REDACTED] erroneously refunded. Underpayment interest should not be assessed and no notice and demand for underpayment interest should be sent to the taxpayer.

This concludes our advice and recommendation. Please feel free to call Attorney James C. Fee, Jr. at 215-597-3442 with any additional questions you may have. We are forwarding a copy of this advice to the Assistant Regional Counsel (Tax Litigation) (CC:NER) and to the Office of Assistant Chief Counsel (Field Service) (CC:DOM:FS) for mandatory 10 day post review. We request that you refrain from taking any action with respect to this advice prior to March 12, 1999.


JOSEPH M. ABELE
Assistant District Counsel

cc: Assistant Regional Counsel (Tax Litigation) (CC:NER)
Office of Assistant Chief Counsel (Field Service) (CC:DOM:FS)